Supreme Court, U.S.
FILED

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United States Supreme Court

SOM NATH CHITKARA,

Petitioner,

v.

NEW YORK TELEPHONE COMPANY (Incorporated in the State of New York), a subsidiary of the NYNEX Corporation and NYNEX CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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53 pp

QUESTION PRESENTED FOR REVIEW

1. May a federal District Court enforce an agreement settling a lawsuit, obtained by a Court-appointed mediator pursuant to the Court's Rules for mediation, when such enforcement is objected to on the uncontradicted allegations that Petitioner's assent thereto had been obtained by false representations—made not by a party, but by the mediator himself—that

a) the instant lawsuit had not been listed on a bankruptcy petition filed by Petitioner five years earlier,

b) any money recovered in the instant lawsuit would thus go directly to the bankruptcy creditors, and

c) the only way that Petitioner would ever see a dime from the lawsuit was if he agreed to the settlement,—then and there.

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all the parties to the proceeding in the Court whose judgment is sought to be reviewed.

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DECISIONS OF THIS COURT, AND SANCTIONED SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER. 5

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POINT II

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

A District Court order (per Block, J.) granting partial summary judgment (Petitioner's Appendix A, pp. 1a-2a) is not published. The District Court opinion (per Johnson, J.), granting the Respondents' motion to enforce the settlement agreement as to the remaining claim (Petitioner's Appendix B, pp. 3a-6a) and amending order, (pp. 7a-8a) are not published. The District Court's opinion (per Johnson, J.) denying Petitioner's motion for reconsideration (Petitioner's Appendix C, pp. 9a-14a) is not published. The Court of Appeals decided the appeal by summary order (Petitioner's Appendix D, pp. 15a-20a), not published in the Federal Reporter. The Court of Appeals denied a motion for rehearing (Petitioner's Appendix E, pp. 21a-22a), not published in the Federal Reporter.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on September 6, 2002. Petitioner moved for rehearing; the Court of Appeals entered its order denying rehearing on December 12, 2002.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The pertinent text of the provisions of § 83.11 of the Rules of the United States District Court for the Eastern District of New York is reprinted in Appendix F at pp. 23a-29a.

STATEMENT OF THE CASE

Petitioner, a long-term employee of New York Telephone Company and NYNEX Corporation (hereinafter "NYNEX"), after retiring under a special incentive retirement program offered by NYNEX, claimed that he was forced to retire in retaliation for his earlier complaints alleging discrimination. When his efforts to be reinstated or rehired for new positions were to no avail, Plaintiff filed the lawsuit below, pursuant to Title VII of the Civil Rights Act of 1964, for employment discrimination. After summary judgment was granted to Defendants in part (App. A, pp. 1a-2a), Magistrate Judge Robert Levy ordered the parties to engage in mediation before a court-appointed mediator to settle the remaining claim of retaliation. (A-17).[1]

The parties entered into a settlement agreement, under which Plaintiff was to receive $50,000, but did not execute a stipulation of settlement. A few days later, Petitioner denounced the agreement, and refused to accept remuneration thereunder, before any attempt was made to enforce the agreement. His reasons:

Petitioner claimed that his signature had been obtained through coercion, undue influence, fraud and duress, that

[1] Such references are to pages in the Appendix filed below.

the mediator had been informed he had filed for bankruptcy in 1995 (NYNEX having obtained a copy of his bankruptcy petition in discovery), with the mediator stating to him "Mr. Chitkara, Come on! What are we doing here? You have no case! The case belongs to the trustees of the bankruptcy court." (A-125). The mediator further told Petitioner Chitkara that the lawsuit was not listed on his bankruptcy petition, that if he were to take the matter to trial, any money that he would recover would go directly to the bankruptcy creditors. The mediator further stated that the only way Chitkara would "ever see a dime" from this lawsuit was if he agreed to the mediated settlement "then and there". (A-126).

These representations were completely false—his bankruptcy petition had listed the lawsuit.[2] But his then counsel being other than his bankruptcy counsel of five years previously, Petitioner acceded to the mediator's demands. His bankruptcy attorney was consulted immediately thereafter, and thereupon Petitioner immediately demanded that the purported settlement be set aside (A-18, A-127). Days before the mediation took place, Petitioner Chitkara's wife had been diagnosed with bone cancer. (A-127, n. 1).

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[2] While there was no contradiction by NYNEX of Petitioner Chitkara's allegation of the mediator making the false statements, and therefore his allegations must be accepted as true, Respondent NYNEX does deny Petitioner Chitkara's allegations that, having learned of the bankruptcy through discovery, it was NYNEX which gave the false information to the mediator. The resolution of such ancillary question is of course made more difficult by the confidentiality provisions of Eastern District Local Rule § 83.11. But it need not be resolved—for in any event, it was the mediator who made the false statement.

Some three months after Chitkara's repudiation of the settlement agreement, NYNEX moved to enforce it (A-85).

As appears from the Appendices *infra*, the motion was granted, and rehearing denied. The Second Circuit affirmed, and denied a rehearing petition. This Petition for Certiorari follows.

REASONS FOR GRANTING THE WRIT

POINT I

TO PROTECT THE UNTAINTED ADMINISTRATION OF JUSTICE, THIS COURT SHOULD NOT PERMIT THE ENFORCEMENT OF A SETTLEMENT AGREEMENT KNOWN TO HAVE BEEN OBTAINED BY A FEDERAL COURT-APPOINTED MEDIATOR THROUGH HIS FALSE STATEMENT OF FACT TO A PARTY, COUPLED WITH HIS OTHER FALSE STATEMENT THAT IF NOT ACCEPTED "THEN AND THERE", THE PARTY WILL RECOVER NOTHING. IN UPHOLDING THE SETTLEMENT, THE COURT BELOW DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT, AND SANCTIONED SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

A. The mediator did not predict the litigation value of the case, but asserted a false fact, and by insisting that Petitioner Chitkara must decide immediately, prevented his counsel from determining the falsity of the mediator's statement.

The Second Circuit recited, quite correctly (App. D *infra*, at p. 20a), that:

> *** The nature of mediation is such that a mediator's statement regarding the predicted litigation value of

> a claim, where that prediction is based on a fact that can readily be verified, cannot be relied on by a counseled litigant whose counsel is present at the time the statement is made.

But the mediator here did not merely make a prediction as to the litigation value of Petitioner Chitkara's claim. He stated, as a *fact*, that the claim had not been included in the bankruptcy schedule. He gave no opportunity whatsoever to counsel who was present to verify the alleged fact, advising Petitioner that he had to immediately accept the settlement then and there, or that he would get nothing, thus denying him an opportunity to verify the fact, putting Petitioner in the uncomfortable position of either believing the mediator—as he did—, or disbelieving an official of the Government of the United States, to wit, the mediator. The affirmance of the Court below was thus on the basis of a situation other than that presented by the record.

Clearly, no one could ever complain if a mediator (or a sitting judge) merely made a prediction of the litigation value of a claim. Here, the mediator did not even purport to predict the litigation value of a claim. He merely made a false representation, not immediately verifiable, accompanied by a statement that it must be acted upon *at once*, thus foreclosing the possibility of verification, and rendering any possible assistance of counsel absolutely nugatory.

B. The false statement was made by a federally appointed mediator.

This is not the usual attempt to set aside an agreement or stipulation, of settlement or otherwise, based on the fraud or false statement of a party to the agreement—it is based

on the false statement of the federally appointed mediator, not a party. Nor was there any attempt to set aside an order or a written stipulation.

C. The falsity of the statement could not be uncovered within the time frame that the mediator allowed.

Even though Chitkara was accompanied by counsel when the false statement was made, it referred to events of five years previously, when the Petitioner had been with another attorney, his bankruptcy attorney. Now he was intimidated by being told that he had to accept the offer "then and there", or else he would not get anything. We thus have a federally appointed mediator who made false statements, made in such a way that a party would have to be foolhardy not to accept the mediator's representation. There was no way to verify the statement "then and there". The presence of counsel was thus rendered nugatory by the mediator's statement.

At no point whatsoever did NYNEX ever deny Petitioner Chitkara's allegations of the false statements made by the federal mediator, appointed under the Eastern District's Local Rule § 83.11, insisting that Petitioner Chitkara immediately accept the settlement proposal or else never obtain anything. While, of course, considerable latitude must be extended to a mediator in attempting to bring together the two antagonistic sides in a legal dispute, dishonesty and intimidation must not be allowed to be a part of a federal mediator's arsenal, at pain of totally discrediting mediation as a useful remedy. While knocking heads together is a time-tested judicial custom, there are avenues in the adversary system of justice which may be traveled to

correct errors and misstatements, but there is no remedy for a person who has been victimized into signing a settlement agreement by false, material and coercive statements made by a federally appointed mediator, himself an arm of the judicial system, other than a court's refusal to enforce the resultant settlement agreement.

The decisions below fail to deal squarely with the issue before this Court. They focus upon whether a contract can be set aside or is voidable because of false statements or a fraudulent inducement by a *party* thereto. They simply fail to focus on the issue of whether a federal court should enforce an agreement obtained not necessarily by the fraud of any party, but by the false and misleading statements of a federal judicial officer, the mediator.

This Court has always carefully upheld the doctrine that the appearance of untainted justice is essential to the federal court system. It has done so in the more usual context of knowing use by a prosecutor of perjured testimony. In the case at bar, the situation is aggravated, for the tainted testimony is not that given by a witness for the prosecution who is subject to cross-examination by defense counsel, nor that of any party, but by the "trier" of the facts himself—or the nearest possible approach to such trier, the mediator in the federally sponsored mediation program.

The decision below is in a way—an important way—in conflict with the decision of the Ninth Circuit in *United States v. LaPage*, 231 F. 3d 488 (9th Cir. 2000), and with this Court's decision in *Napue v. Illinois*, 360 U.S. 264, 269 (1959) upon which *LaPage* relied. The Ninth Circuit held as follows (at 491):

> "*** Over forty years ago, the Supreme Court made it clear that "a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." [Citing Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173 (1959)]. "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." The Court explained that this principle "does not cease to apply merely because the false testimony goes only to the credibility of the witness." Rather, "[a] lie is a lie, no matter what its subject." Because the use of known lies to get a conviction deprives a defendant of his constitutional right to due process of law, we must reverse LaPage's conviction unless [the] false testimony was "harmless beyond a reasonable doubt."

In the case at bar, the agreement which was sought to be enforced was reached on the basis of the false statements of the mediator, which were allowed to go uncorrected. But a lie is a lie, as this Court said, and it is particularly onerous and unconscionable when that lie is not made by a witness, but by the hearing officer, a judicial officer of the United States. The very one who should correct and prevent such a lie is the one who made it. As the court noted in *LaPage*, *id.* at 492, the government's duty to "correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony is false. Where the prosecutor knows that his witness has lied, he has a constitutional duty to correct the false impression of the facts." Where, as here, the mediator has told an untruth, the court has a constitutional duty

to correct it, by refusing to enforce the resulting agreement. It must not become party to the false statement by endorsing its result.

The same result applies in civil cases. Thus, in *Communist Party v. Control Board*, 351U.S. 115 (1956), this Court reviewed a judgment affirming an order of the Subversive Activities Control Board requiring that the Communist Party register with the Attorney General as a communist action organization, which would then have become subject to certain non-criminal regulations. While the proceeding was pending, a motion was filed to adduce additional evidence which had become available subsequent to the administrative proceeding to establish the falsity of the testimony of three of the witnesses for the Attorney General. The government, in response, asserted that the rehearing should not be reopened for the receipt of evidence merely questioning the credibility of some witnesses, but not any fact at issue. Ruled this Court, *id.* at 124-5:

> *** The untainted administration of justice is certainly one of the most cherished aspect of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. (Citation omitted). Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.
>
> When uncontested challenge is made that a finding of subversive design by petitioner was in part the product of three perjurious witnesses, it does not

> remove the taint for a reviewing court to find that there is ample innocent testimony to support the Board's findings. If these witnesses in fact committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceedings, their testimony in this proceeding is inevitably discredited and the Board's determination must duly take this fact into account. We cannot pass upon a record containing such challenged testimony. We find it necessary to dispose of the case on the grounds we do, not in order to avoid a constitutional adjudication but because the fair administration of justice requires it. Since reversal is thus demanded, however, we do not reach the constitutional issues.

Similarly, the statements of the mediator have been completely discredited. The Court below should not have issued an order enforcing a settlement agreement arrived at on the basis of the mediator's own false statements. The fair administration of justice requires the result that we seek here.

Shortly after its decision in *Communist Party v. Control Board*, the Supreme Court dealt with a similar situation in a criminal case, in *Mesarosh v. United States*, 352 U.S. 1, 9 (1956) holding that

> *** The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial.

As this Court put it (352 U.S. at 14):

> Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

In the case at bar, the mediator poisoned the water in the reservoir of justice. The duty of this Court to see that the waters of justice are not polluted mandates a grant of certiorari here and a reversal.

It should also be noted that counsel were present both in the *Communist Party* and the *Mesarosh* cases, and yet this Court unhesitatingly reversed judgments based upon the false testimony of witnesses. The false representations of a federal mediator should be given the same short shrift as in *Mesarosh* and *Communist Party* cases.

In a criminal trial, materially false testimony may or may not be the reason for a conviction —in a jury trial, certainly, the Court can never know. But in the situation of enforcing a settlement agreement obtained through a mediator's false statement, the Court *does* know that without the false statement, there would not have been a settlement agreement.

POINT II

BY MAKING A FALSE STATEMENT OF FACT, AND BY INSISTING THAT PETITIONER WOULD NOT RECEIVE A PENNY UNLESS HE ACCEPTED THE SETTLEMENT OFFER "THEN AND THERE", THE MEDIATOR DEPRIVED PETITIONER OF A MEANINGFUL OPPORTUNITY TO BE HEARD, AND CREATED THE APPEARANCE OF BIAS, DEPRIVING PETITIONER OF PROPERTY WITHOUT THE DUE PROCESS OF LAW REQUIRED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND DEPRIVED PETITIONER OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT.

Of course, anyone attempting to settle a dispute does and must exert pressure. But, we submit, the making of a false statement of fact to a party—even if represented by counsel—that unless he accepted the settlement offer "then and there", he would get nothing, deprived the Petitioner of a meaningful opportunity for the effective assistance of counsel (a Sixth Amendment violation), requiring the litigant to then and there make his determination, without giving him or his attorney any opportunity to check the correctness of the factual assertion. This concatenation of circumstances adds a coercive effect. It would be the brave litigant indeed who would not believe the mediator—the bankruptcy had occurred over 5 years earlier, and certainly Petitioner cannot have been expected to remember what was listed in his bankruptcy petition. And he was warned by the mediator that unless he accepted the offer "then and

there", he would not recover *anything*—a pronouncement which of course, under such circumstances, had to be accepted as true. Thus, even if there was no bias on the part of the mediator, there was certainly an appearance of bias, and the mediator, by his own words, deprived Petitioner of a reasonable opportunity to be heard on the question of whether or not the claim had been listed in the earlier bankruptcy petition.

Such conduct would seem to be forbidden by the due process clause of the Fifth Amendment. As previously held by this Court, "the right to an impartial decision-maker is required by due process" in every case. *Arnett v. Kennedy*, 416 U.S. 134, 197 (1974) (White, J., concurring in part and dissenting in part). And since "the appearance of even-handed justice ** is at the core of due process," [*Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) Harlan, J., concurring (see, also, *Offutt v. United States*, 348 U.S. 11 (1954)], a court may disqualify decision makers who in fact have no actual bias if they might reasonably appear to be biased. See *Morrissey v. Brewer*, 408 U.S. 471, 485-6 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

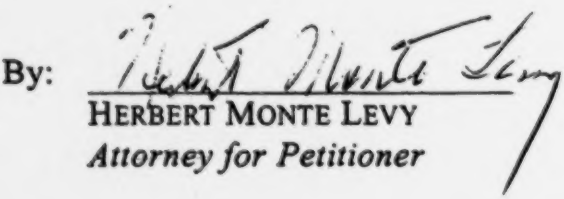
Persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, N.5 (1982), quoting *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). Here, the mediator's insistence on Petitioner Chitkara's immediate action then and there, prevented him from checking the correctness of the statement as to what had appeared in the bankruptcy petition, worked to deny him any meaningful opportunity to be heard, which is a denial of due process. *Boddie*, *supra*, at 377.

Alternative Dispute Resolution is still in its comparative infancy. To allow the poisoning of the mediation process by permitting mediators to in effect impose a settlement by the making of false statements and false deadlines, unreviewable judicially, would render ADR a process to which few if any would be willing to submit. We will not bore the Court with recitations of the importance of Alternative Dispute Resolution, with which we are sure the members of the Court are familiar. But if ADR is to have its day, it must not be stillborn by the tactics of the mediator here.

CONCLUSION

This Court should grant certiorari, reverse the decision below, and order that the matter be continued.

Respectfully submitted,

By: 

HERBERT MONTE LEVY
Attorney for Petitioner

Dated: New York, New York
March 12, 2003.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

93-CV-4479 (FB)

Received March 11, 1998

SOM NATH CHITKARA,

Plaintiff,

—against—

NEW YORK TELEPHONE and NYNEX CORPORATION,

Defendants.

Appearances:

For Plaintiff:
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139 East 23rd Street
New York, New York 10010

For Defendants:
RONALD G. BURDEN, Esq.
1095 Avenue of the Americas
New York, New York 10036

ORDER

BLOCK, District Judge:

Defendants New York Telephone and NYNEX Corporation have moved to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons stated at oral argument, defendants' motion is granted in part and denied in part. The complaint is dismissed except for plaintiff's retaliation claim alleging that plaintiff's filing of a charge of discrimination with the EEOC on February18, 1992, triggered a letter from defendants dated April 24, 1992, that stated defendants would not negotiate with plaintiff. The basis of plaintiff's retaliation claim is discrimination based upon race and color. Plaintiff's state law invasion of privacy claim is not dismissed at this time.

SO ORDERED.

/s/ FREDERIC BLOCK
FREDERIC BLOCK
United States District Judge

DATED: Brooklyn, New York
March 6, 1998

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

93-CV-04479

United States Courthouse
Brooklyn, New York
January 26, 2001 9:30 o'clock a.m.

CHITKARA,

Plaintiff,

v.

NEW YORK TELEPHONE,

Defendants.

TRANSCRIPT OF DECISION
BEFORE THE HONORABLE STERLING JOHNSON, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	ROCCO G. AVALLONE, ESQ.
For the Defendant:	RONALD G. BURDEN, ESQ.
Court Reporter:	Sheldon Silverman 225 Cadman Plaza East Brooklyn, New York11201 (718) 260-2537

Proceedings recorded by mechanical stenography, transcript produced by CAT.

THE COURT: I'll read my decision into the record.

Plaintiff, Som Chitkara, formerly employed by the New York Telephone Company, brings this action pursuant to Title VII of the Civil Rights Act of 1964, alleging that New York Telephone Company and NYNEX Corporation engaged in discriminatory, retaliatory and other illegal employment conduct. Defendant's motion for summary judgment wa granted, in part, and denied, in part, by Judge Frederick Block, one of the judges who has previously presided over this case. After the issuance of that order, the parties stipulated to dismiss all but plaintiff's retaliation claims. Magistrate Judge Robert Levy then ordered the parties to engage in mediation before a court-appointed mediator so as to settle the remaining retaliation claims. During that mediation session, plaintiff and defendants entered into a settlement agreement, which plaintiff now seeks to rescind. Presently before this Court is defendants' motion to enforce the parties' settlement agreement.

Plaintiff alleges that the settlement agreement was effected through coercion, undue influence, fraud and duress, and is therefore unenforceable. Plaintiff has made the following factual accusations in support of his claim.

Plaintiff challenges the administration of the mediation session, specifically the mediator's alleged failure to inform the parties of information such as the confidentiality of the mediation or the extent of the mediator's authority. Plaintiff next claims that during the mediation session, the mediator met privately with defendants at which time defendants informed the mediator that plaintiff had filed for bankruptcy and defendants provided the mediator with a copy of plaintiff's bankruptcy petition.

Plaintiff alleges that through these actions defendant encouraged the mediator to pressure plaintiff to sign the agreement by convincing plaintiff that his lawsuit was not listed on his bankruptcy petition and as such any monies ordered to plaintiff at trial would be seized by bankruptcy creditors. Plaintiff asserts that he relied on these misrepresentations and reluctantly signed the settlement agreement. Shortly after the signing the agreement, plaintiff learned that the lawsuit was listed on his bankruptcy petition and therefore exempted from being seized by creditors. Plaintiff's ultimate assertion is that but for the mediator's alleged false statements, he would not have entered into the settlement agreement.

Defendants contend that plaintiff voluntarily entered into the settlement agreement. Defendants argue that plaintiff was represented by counsel during the settlement negotiations, and that counsel was extremely familiar with the issues of the instant lawsuit.

Furthermore, defendants deny any improper communications with the mediator during the mediation session, and any prior knowledge of plaintiffs bankruptcy filing.

This court recognizes that plaintiff may now be unsatisfied with the terms of the settlement agreement. However, the court cannot find as a matter of law that the settlement agreement is voidable.

As stated in Kohl Industry Park Company versus County of Rockland, a settlement is a contract and once entered into is binding and conclusive. Kohl Industry Park Company versus County of Rockland, 710 F.2d, 895, 903 Second Circuit, 1983.

There can be no doubt that there was an agreement in this case. Although handwritten, there is a document listing the settlement terms, among them the defendants' obli-

gation to pay plaintiff $50,000 and plaintiff's obligation to dismiss the case with prejudice. The document was clearly signed by the defendants, plaintiff, and plaintiff's counsel. Even if plaintiff's conclusory allegations regarding defendants' participation in alleged fraud and misrepresentation were accepted as true, this court finds these allegations do not sufficiently plead fraud or misrepresentation. See Quiroga versus Fall River music Inc., 1996, WL 148363, Southern District New York, 1996.

Finding fraud must be pled with particularity. Plaintiff was represented by counsel during all of the settlement negotiations. Furthermore, plaintiff should have [5] known, or with minimal effort, could have ascertained the contents of his bankruptcy petition prior to entering into an agreement with defendant.

Finally, the Court finds the agreement enforceable as a matter of judicial policy. In Janneh versus GAF Corporation, the Second Circuit outlined the judicial and public policy which favors out-of-court settlement of disputes. Janneh versus GAF Corporation, 887 F.2d, 432, 435, 1989. The Janneh court recognized settlement as a "positive force, indispensable to judicial administration" and noted that "Congress has expressed a strong preference for encouraging voluntary settlement of employment discrimination claims in particular."

For the foregoing reasons, defendants' motion is granted. The parties to this action are hereby ordered to file a formalized and fully executed version of the settlement agreement with this Court within 20 days of this order. Of he.

MR. AVALLONE: Note my exception.

(Whereupon this matter was concluded for this date.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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93 CV 4479 (SJ)

Filed February 28, 2001

SOM N. CHITKARA,

Plaintiff,

—against—

NEW YORK TELEPHONE COMPANY
and NYNEX CORPORATION,

Defendants.

APPEARANCES:

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Attorneys for Plaintiff

VERIZON NEW YORK, INC.
and VERIZON CORPORATION
(formerly New York Telephone Company
and NYNEX Corporation)
1095 Avenue of the Americas
New York, New York 10036
By: Ronald G. Burden, Esq.
Attorney for Defendants

ORDER

JOHNSON, District Judge:

On January 29, 2000, this Court issued an Order granting Defendant's motion to enforce the parties' settlement agreement. It has come to the attention of the Court that the above-referenced Order incorrectly identified counsel for Plaintiff. Accordingly, the Court hereby amends that Order to reflect the true attorneys of record.

For the reasons stated on the record at the January 26, 2001 hearing, Defendants' motion to enforce the parties' settlement is granted. The parties to this action are hereby ordered to file a formalized and fully-executed settlement agreement with the Court within twenty (20) days of the above-referenced hearing.

SO ORDERED.

/s/ STERLING JOHNSON
U.S.D.J.

DATED: FEBRUARY 8, 2001
Brooklyn, New York

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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93 CV 4479 (SJ)

SOM N. CHITKARA,

Plaintiff,

—against—

NEW YORK TELEPHONE COMPANY
and NYNEX CORPORATION,

Defendants.

APPEARANCES:

SCHNEIDER GOLDSTEIN BLOOMFIELD, LLP
152 West 57th Street
New York, New York 11019
Attorneys for Plaintiff

VERIZON NEW YORK, INC.
and VERIZON CORPORATION
(formerly New York Telephone Company
and NYNEX Corporation)
1095 Avenue of the Americas
New York, New York 10036
By: Ronald G. Burden, Esq.
Attorney for Defendants

MEMORANDUM AND ORDER

JOHNSON, District Judge:

On January 26, 2001, this Court granted Defendants' motion to enforce the parties' settlement agreement. Presently before the Court is Plaintiff's motion for reconsideration pursuant to Rule 59(e) of the Federal Rules of Civil Procedure ("Federal Rule 59(e)"), and Eastern District of New York Local Civil Rule 6.3 ("Local Rule 6.3"). For the following reasons, Plaintiff's motion for reconsideration is denied in its entirety.

Background

Plaintiff Som N. Chitkara ("Plaintiff") alleged that his employer, Defendants New York Telephone Company and Nynex Corporation ("Defendants"), discriminated against him in the terms and conditions of his employment on the basis of his race, religion, and national origin. In 1990, after 20 years at the company, he retired under a special incentive retirement program offered by Defendants. Plaintiff claims that he was forced to retire in retaliation for his earlier complaints alleging discrimination. When his efforts to be reinstated or rehired for new positions were to no avail, Plaintiff filed the instant lawsuit. Defendants moved for summary judgment, which was granted, in part, and denied, in part, by Judge Frederic Block on March 6, 1998. The case was reassigned to this Court on June 6, 1999. On February 14, 2000, Magistrate Judge Robert Levy ordered the parties to engage in mediation before a court-appointed mediator to settle the remaining retaliation claims. During the mediation, the parties reached a settlement agreement, which was written out by hand and signed by the parties. Plaintiff sought to rescind the

agreement, alleging that his acquiescence was obtained through coercion, undue influence, fraud, and duress. Defendants moved to enforce the parties' settlement agreement, which was granted by this Court on January 26, 2001. Plaintiff has now moved for reconsideration of that Order.

Timeliness

Defendants argue that Plaintiff's motion should be barred as untimely. Local Rule 6.3 requires that motions for reconsideration be made within ten (10) days after the docketing of the court's determination of the original motion. This Court decided the motion at a hearing before the parties on January 26, 2001 and the Order was docketed on February 9, 2001. However, the docket sheet reflects that an Order enforcing the parties' settlement agreement was entered on February 28, 2001. Plaintiff filed this motion on March 9, 2001, within ten days of the later docket entry. Thus, this motion is considered timely filed.

Motion for Reconsideration

Local Rule 6.3 authorizes the Court to reconsider its own rulings or allow reargument at its discretion. The rule is strictly construed in order to keep the Court's docket free of unnecessary relitigation. *See Bell Sports, Inc. v. System Software Assocs., Inc.*, 71 F.Supp.2d 121, 125-26 (E.D.N.Y. 1999) party seeking reconsideration bears "difficult burden . . . in order to dissuade repetitive arguments") (internal quotations omitted); *Quartararo v. Catterson*, 73 F.Supp.2d 270, 273 (E.D.N.Y. 1999) (noting Rule 6.3's "design to prevent re-litigation").

Federal Rule 59(e) authorizes the Court to alter or amend a judgment at its discretion. *See McCarthy v. Manson*, 714 F.2d

234, 237 (2d Cir. 1983). The standard for granting a motion for reconsideration is strict; "reconsideration will be denied unless the moving party can point to controlling decisions or data that the court overlooked . . . that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transportation, Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). A party may not advance a new argument in a motion to reconsider. *See Eisemann v. Greene*, 204 F.3d 393, 395 n.2 (2d Cir. 2000) ("To be entitled to reargument, a party 'must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion.'") (citation omitted); *see also Gallo v. Madera*, 136 F.3d 326, 330 (2d Cir. 1998) (upholding District Court's opinion that "the argument was untimely and that it would be 'an abuse of process' to let appellants try this new tack on a motion for reconsideration."). Nor may a moving party merely reiterate or repackage an argument previously rejected by the court. *See Resource N.E. of Long Island v. Town of Babylon*, 80 F.Supp.2d 52, 64 (E.D.N.Y. 2000) (A motion to reconsider "is not a vehicle to reargue those issues already considered when a party does not like the way the original motion was resolved.").

Here, Plaintiff moves for reconsideration on the grounds that this Court overlooked the mandatory confidentiality provisions of Local Civil Rule 83.11(d)(3) and Defendants' alleged violation of that confidentiality when they filed their motion to enforce the settlement. Further, Plaintiff argues that this Court improperly enforced the mediation settlement through application of an incorrect legal standard. None of these claims were raised in the original motion papers; thus they are not properly before this Court in a motion for reconsideration.

Confidentiality Provisions

Plaintiff first argues that the confidentiality provisions of the Eastern District's court-sponsored mediation program under Local Civil Rule 83.11(d)(3) prohibit the Court from enforcing the mediation settlement. This rule provides that "[i]nformation about what transpires during mediation sessions will not at any time be made known to the court. . . ." Plaintiff alleges that Defendants breached this rule when they filed a copy of the agreement with their motion to enforce the settlement agreement. This issue was not raised by either party in any of the previous motions. In his initial Memorandum of Law in Opposition to Defendants' Motion to Enforce Settlement Agreement, Plaintiff argued that the underlying settlement agreement was not valid as a result of alleged misrepresentations and coercion by the mediator. Indeed, Plaintiff himself revealed details of the mediation discussion and settlement agreement to the Court in arguing that it should not be enforced. This Court rejected those arguments. Plaintiff does not present any new legal authority that this Court overlooked previously. Thus, this Court declines to grant his motion for reconsideration on those grounds.

Enforceability of the Mediation Settlement

In further support of his motion for reconsideration, Plaintiff challenges this Court's decision in enforcing the mediation settlement. Plaintiff argues that the Court applied the wrong standard to enforcement of settlement agreements involving federal discrimination claims, and then contends that the Court may not enforce such agreements at all. Plaintiff did not initially raise these arguments before the Court or in his previous briefs prior to this Court's decision granting Defendants' motion to enforce the settlement. In fact, Plain-

tiff earlier asserted that contract law principles were the correct basis for consideration of the mediation agreement. (Pl.'s Mem. in Opp'n. To Defs.' Mot. to Enforce at 6.) At that time, Plaintiff applied New York Contract law in his attempt to show that the contract in question, the mediation settlement, was void or voidable. Plaintiff's newly proffered claim does not constitute supporting data or authority that was overlooked by this Court, but, in fact, is a completely new argument which contradicts his prior arguments. As such, it is not an appropriate basis for reconsideration. *See Eisemann*, 204 F.3d at 395 n.2; *Gallo*, 136 F.3d at 330. Accordingly, this Court denies Plaintiff's motion for reconsideration.

Conclusion

Plaintiff fails to present any controlling authority or data that the Court overlooked previously. Accordingly, his motion for reconsideration is DENIED.

SO ORDERED.

/s/ STERLING JOHNSON, JR.
U.S.D.J.

DATED: November __, 2001
Brooklyn, New York

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 01-7274

Filed September 6, 2002

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6th day of September, two thousand and two.

Before:

HON. GUIDO CALABRESI,
HON. BARRINGTON D. PARKER, JR.,
Circuit Judges.

HON. SIDNEY H. STEIN,
*District Judge.**

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* The Honorable Sidney H. Stein, United States District Court for the Southern District of New York, sitting by designation.

SOM NATH CHITKARA,

Plaintiff-Appellant,

—against—

NEW YORK TELEPHONE COMPANY
and NYNEX CORPORATION,

Defendants-Appellees.

For Plaintiff-Appellant:

DONALD F. SCHNEIDER, Schneider, Goldstein & Bloomfield, LLP, New York, NY.

For Defendants-Appellees:

CARLA R. WALWORTH, Neil B. Stekloff, *on the brief*, Paul, Hastings, Janofsky & Walker, LLP, Stamford, Conn.

Appeal from the United States District Court for the Eastern District of New York (Sterling Johnson, Jr., *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Plaintiff-Appellant Som Nath Chitkara ("Plaintiff") appeals from a decision of the district court (Johnson, *J.*) granting the defendants' Motion to Enforce the Parties' Settlement Agreement. We affirm the district court's decision for substantially the reasons it stated.

BACKGROUND

In the 1993, Plaintiff filed Title VII and state-law discrimination and retaliation claims against his former employer, the New York Telephone Company, and its parent company, the NYNEX Corporation (collectively, "Defendants"). Not long afterwards he filed for bankruptcy. In 1998, the district court (Block, *J.*) dismissed most of Plaintiff's claims as time-barred, leaving only a single retaliation count.[1] Hoping to resolve this final claim, counsel for both sides applied to participate in a court-annexed mediation program. Their application was granted, and mediation took place on June 12, 2000. What came out of the mediation was a handwritten agreement, signed by both parties and their respective attorneys, indicating that Plaintiff would dismiss his claim with prejudice in return for $50,000. What took place during the mediation is hotly contested and not verifiable on the record before us.

The heart of the matter, on Plaintiff's account, is that after meeting privately with Defendants' counsel who, Plaintiff surmises, provided the mediator with a copy of Plaintiff's bankruptcy petition,[2] the mediator harangued the plaintiff into settling: "Mr. Chitkara, Come on! What

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[1] In June of 1999, the case was transferred to the docket of Judge Johnson.

[2] Defendants allegedly got hold of this document through discovery.

are we doing here? You have no case! This case belongs to the trustees of the bankruptcy court." The mediator explained that the lawsuit was not listed on Chitkara's bankruptcy petition, and so if the case went to trial, any moneys recovered would go directly to creditors. The only way that Plaintiff would ever "see a dime," the mediator said, was if he "agreed to the mediated settlement then and there."

On the affidavit from Defendants' lawyer, however, the mediation was quite ordinary and, in any event, counsel for the defendants did not supply and could not have supplied the mediator with information about Plaintiff's bankruptcy because, at the time, counsel was unaware of it.

Within days of the mediation, Plaintiff learned from his bankruptcy attorney that his Title VII claim was in fact insulated from creditors of the bankruptcy estate. He promptly disavowed the settlement and cut ties with his Title VII attorney. Five months later, Defendants served a motion to enforce the settlement. Plaintiff responded by hiring a new attorney, who drafted and filed a Memorandum of Law in Opposition to the Motion to Enforce. This document advances not one legal argument, to wit, that the settlement agreement was voidable, pursuant to Restatement (Second) of Contracts § 164(2), because Plaintiff had justifiably relied on a fraudulent or material misrepresentation by the mediator. The court below granted Defendants' motion, holding that Plaintiff could not prevail even on his own version of the "facts," whereupon Plaintiff switched lawyers yet again and filed a motion for reconsideration. This motion advances a new theory of voidability and argues, in the alternative, that local mediation confidentiality rules preclude judicial enforcement of settlement agreements procured through court-annexed mediation unless the agreement has

been memorialized in a standard-form stipulation and filed with the court. The motion for reconsideration was denied, and this appeal followed.

On appeal, Plaintiff contends that the district court erred in denying the motion for reconsideration. He also puts forth several contract-based theories of voidability, and further proposes that the settlement is "a nullity" due to procedural violations of mediation rules.

DISCUSSION

In reviewing the district court's ruling on a motion for reconsideration, we apply an "abuse of discretion" standard, *see Devlin v. Transp. Communications Int'l. Union*, 175 F.3d 121, 131-32 (2d Cir. 1999), which is "one of the most deferential standards of review," *In re Bolar Pharm. Co.*, 966 F.2d 731, 732 (2d Cir. 1992) (per curiam). It is beyond question that the district court stayed well within the permissible range of discretion in denying the motion for reconsideration, as that motion pertained entirely to legal theories that Plaintiff had not earlier put before the court. *See Eisemann v. Greene*, 204 F.3d 393, 395 n.2 (2d Cir. 2000) (per curiam) ("To be entitled to reargument, a party must demonstrate that the court overlooked controlling decisions of factual matters that were put before it on the underlying motion." (citation and internal quotation marks omitted)). Plaintiff has no more right to have new theories heard on appeal than on reconsideration, and this is not one of those rare cases where we think it necessary to deviate from the usual policy to avoid a manifest injustice. *See Giordano v. City of New York*, 274 F.3d 740, 752 (2d Cir. 2001).

What remains, essentially, is Plaintiff's original contract-law claim, as he has elaborated it on appeal. But *justified*

reliance is integral to his claim, *see* Restatement (Second) of Contracts § 164(2) (1981), and this he cannot show. The nature of mediation is such that a mediator's statement regarding the predicted litigation value of a claim, where that prediction is based on a fact that can readily be verified, cannot be relied on by a counseled litigant whose counsel is present at the time the statement is made. That is in essence what the district court held, and we therefore affirm.

We have considered Plaintiff's remaining contentions and adjudge them meritless. Accordingly, the trial court's ruling is AFFIRMED.

For the Court,

ROSEANN B. MACKECHNIE,
Clerk of the Court

By: /s/ LUCILLE CARR
Lucille Carr

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 01-7274

Filed December 12, 2002

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of December, two thousand two.

Before:

HON. GUIDO CALABRESI,
HON. BARRINGTON D. PARKER, JR.,
Circuit Judges.

HON. SIDNEY H. STEIN,*
District Judge.

CHITKARA

v

New York Telephone

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* The Honorable Sidney H. Stein of the United States District Court for the Southern District of New York, sitting by designation.

A petition for panel rehearing having been filed herein by Som Nath Chitkara

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: /s/ ARTHUR M. HELLER
Arthur M. Heller,
Administrative Attorney

APPENDIX F

Local Civil Rule 83.11. Court-Annexed Mediation
(Eastern District Only)

(a) Description. Mediation is a process in which parties and counsel agree to meet with a neutral mediator trained to assist them in settling disputes. The mediator improves communication across party lines, helps parties articulate their interests and understand those of the other party, proves the strengths and weaknesses of each party's legal positions, and identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute. In all cases, mediation provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or which could not be addressed by judicial action. A hallmark of mediation is its capacity to expand traditional settlement discussions and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy.

(b) Mediation Procedures.

(1) Eligible cases. Judges and Magistrate Judges may designate civil cases for inclusion in the mediation program, and when doing so shall prepare an order to that effect. Alternatively, and subject to the availability of qualified mediators, the parties may consent to participation in the mediation program by preparing and executing a stipulation signed by all parties to the action and so-ordered by the Court.

(A) Mediation deadline. Any court order designating a case for inclusion in the mediation program, however arrived at, may contain a deadline not to exceed six months from the date of entry on the docket of that order. This deadline may be extended upon motion to the Court for good cause shown.

(2) Mediators. Parties whose case has been designated for inclusion in the mediation program shall be offered the options of (a) using a mediator from the Court's panel, a listing of which is available in the Clerk's Office; (b) selecting a mediator on their own; or (c) seeking the assistance of a reputable neutral ADR organization in the selection of a mediator.

(A) Court's panel of mediators. When the parties opt to use a mediator from the Court's panel, the Clerk's Office will appoint a mediator to handle the case who (i) has been for at least five years a member of the bar of a state or the District of Columbia; (ii) is admitted to practice before this Court; and (iii) has completed the Court's requirements for mediator training and mediator expertise. If any party so requests, the appointed mediator also shall have expertise in the area of law in the case. The Clerk's Office will provide notice of their appointment to all counsel.

(B) Disqualification.

* * *

(3) Scheduling the mediation.

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(4) Written mediation statements.

* * *

(5) Mediation session(s). The mediator meets initially with all parties to the dispute and their counsel in a joint session. The mediator may hold mediation sessions in his/her office, or at the Court, or at such other place as the parties and the mediator shall agree. At this meeting, the mediator explains the mediation process and gives each party an opportunity to explain his or her views about the matters in dispute. There is then likely to be discussion and questioning among the parties as well as between the mediator and the parties.

(A) Separate caucuses. At the conclusion of the joint session, the mediator will typically caucus individually with each party. Caucuses permit the mediator and the parties to explore more fully the needs and interests underlying the stated positions. In caucuses the mediator strives to facilitate settlement on matters in dispute and the possibilities for settlement. In some cases the mediator may offer specific suggestions for settlement; in other cases the mediator may help the parties generate creative settlement proposals.

(B) Additional sessions. The mediator may conduct additional joint sessions to promote further direct discussion between the parties, or

she/he may continue to work with the parties in private caucuses.

(C) Conclusion. The mediation concludes when the parties reach a mutually acceptable resolution, when the parties fail to reach an agreement, on the date the Judge or Magistrate Judge specified as the mediation deadline in their designation order, or in the event no such date has been specified by the Court, at such other time as the parties and/or the mediator may determine. The mediator has no power to impose settlement and the mediation process is confidential whether or not settlement is reached.

(6) Settlement. If settlement is reached, in whole or in part, the agreement, which shall be binding upon all parties, will be put into writing and counsel will file a stipulation of dismissal or such other document as may be appropriate. If the case does not settle, the mediator will immediately notify the Clerk's Office, and the case or the portion of the case that has not settled will continue in the litigation process.

(c) Attendance at Mediation Sessions.

* * *

(d) Confidentiality.

(1) The parties will be asked to sign an agreement of confidentiality at the beginning of the first mediation session to the following effect:

(A) Unless the parties otherwise agree, all written and oral communications made by the

parties and the mediator in connection with or during any mediation session are confidential and may not be disclosed or used for any purpose unrelated to the mediation.

(B) The mediator shall not be called by any party as a witness in any court proceeding related to the subject matter of the mediation unless related to the alleged misconduct of the mediator.

(2) Mediators will maintain the confidentiality of all information provided to, or discussed with, them. The Clerk of Court and the ADR Administrator are responsible for program administration, evaluation, and liaison between the mediators and the Court and will maintain strict confidentiality.

(3) No papers generated by the mediation process will be included in Court files, nor shall the Judge or Magistrate Judge assigned to the case have access to them. Information about what transpires during mediation sessions will not at any time be made known to the Court, except to the extent required to resolve issues of noncompliance with the mediation procedures. However, communications made in connection with or during a mediation may be disclosed if all parties and, if appropriate as determined by the mediator, the mediator so agree. Nothing in this section shall be construed to prohibit parties from entering into written agreements resolving some or all of the case or entering and filing with the Court procedural or factual stipulations based on suggestions or agreements made in connection with a mediation.

(e) Oath and Disqualification of Mediator.

(1) Each individual certified as a mediator shall take the oath or affirmation prescribed by 28 U.S.C. § 453 before serving as a mediator.

(2) No mediator may serve in any matter in violation of the standards set forth in Section 455 of Title 28 of the United States Code. If a mediator is concerned that a circumstance covered by subparagraph (a) of that section might exist, e.g., if the mediator's law firm has represented one or more of the parties, or if one of the lawyers who would appear before the mediator at the mediation session is involved in a case on which an attorney in the mediator's firm is working, the mediator shall promptly disclose that circumstance to all counsel in writing. A party who believes that the assigned mediator has a conflict of interest shall bring this concern to the attention of the Clerk's Office in writing, within ten calendar days of learning the source of the potential conflict or the objection to such a potential conflict shall be deemed to have been waived. Any objections that cannot be resolved by the parties in consultation with the Clerk's Office shall be referred to the Judge or Magistrate Judge who has designated the case for inclusion in the mediation program.

(3) A party who believes that the assigned mediator has engaged in misconduct in such capacity shall bring this concern to the attention of the Clerk's Office in writing, within ten calendar days of learning of the alleged misconduct or the objection to such alleged misconduct shall be deemed to have been waived. Any objections that cannot be resolved by the

parties in consultation with the Clerk's Office shall be referred to the Judge who has designated the case for inclusion in the mediation program.

(f) Services of the Mediators.

(1) Participation by mediators in the program is on a voluntary basis, without compensation. Attorneys serving on the Court's panel will be given credit for pro bono work.

(2) Appointment by the Court's panel is for a three year term, subject to renewal. A panelist will not be expected to serve on more than two cases during any twelve month period and will not be required to accept each assignment offered. Repeated rejection of assignments will result in the attorney being dropped from the panel.

(g) Immunity of the Mediators. Mediators shall be immune from liability or suit with respect to their conduct as such to the maximum extent permitted by applicable law.